A

LETTER

TO

THOMAS PEMBERTON, Esq., M.P.,

ON THE

PRIVILEGES

OF

THE HOUSE OF COMMONS,

NOW IN CONTROVERSY.

BY

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LONDON:

CHARLES KNIGHT & CO., 22, LUDGATE-STREET.

MDCCCXXXVIII.

A LETTER,

&c.

DEAR SIR,

Fully concurring with you in the great importance of the questions now in controversy regarding the privileges of the House of Commons, I make no apology for attempting to answer the positions laid down in your letter to Lord Langdale; and I adopt your own expressions with great sincerity when I say, that 'I shall regret it, if the freedom which it is necessary to use in speaking of the doctrine advanced should be considered as inconsistent with the highest respect for its author.' Indeed, nothing would be more painful to me than to be misunderstood on this point; for of those who take the same view of the subject with yourself, some there are whose friendship I prize as among the best of my few possessions, and from whom a difference of opinion in matters of practical importance is a rare and unwelcome occurrence. Still, no man whose pursuits in life have led him to investigate this

or any other subject of moment to the public, ought to permit private feelings to interfere with the free expression of his deliberate opinions. I attach as little value to mine as any one else can do; yet as no two spectators will see an object of this kind from exactly the same point of view, and as it is desirable that it should be observed in all its bearings, these remarks may not be without their use.

I proceed, then, without further preface to inquire, First, whether the House of Commons has the right to publish such of its reports, votes, and proceedings, as it shall deem important to the public to become acquainted with: and Secondly, where the power is lodged by the Constitution of determining what is, or what is not, a Privilege of Parliament.

And it will, I think, be convenient to treat these two questions in connexion with each other, as the precedents and authorities to which I shall have occasion to refer, will frequently throw light on both: to separate them would, therefore, probably lead to repetition.

As regards the use of the particular privilege under review, the facts are clear, and all bear in one direction. The printing of the proceedings of the House of Commons for publication is traced back in the evidence appended to the report of May last, to the year 1641; and the usage has continued down to the present day

with a few interruptions, quite unimportant to this discussion; inasmuch as there is no reason for supposing they arose from any doubt of the right. Indeed, whenever the reason for interruption is given, it is found to be altogether beside the question of right, and turns on matters of discretion, which again but seldom contemplate any forbearance towards individuals whose conduct may have become the subject of animadversion.

A writer, whose work has obtained high commendation from you, attempts to weaken the effect of this long usage, by taking objections which do not appear to me to be well founded. 'It must of course,' he says, 'be at once obvious to every one, that the mere fact of publishing the *votes*, cannot prove any thing with reference to the privilege now claimed, for nothing of a defamatory nature can, by possibility, be contained in such a publication*.'

This is a very broad assertion. One does not see how the learned writer had persuaded himself of the impossibility which he lays down with so much emphasis. What were the arguments, *à priori*, which affected his mind, I cannot say; but surely if he had taken the trouble to examine the journals, he must have found numberless instances in which the votes *do* contain

* Remarks on a Report of a Select Committee of the late House of Commons on the Publication of Printed Papers, p. 16.

defamatory matter. How often, for instance, has the House committed witnesses for prevarication, and how could it, 'by possibility,' avoid stating the charge in the votes of the day? Is the writer aware, that until lately all petitions were printed *in extenso* as an appendix to the votes, and distributed with them? Now certainly there has been no lack of defamatory matter in *them*. Yet it was not the presence of defamatory matter which led the House to discontinue the old practice of printing all petitions, but simply the overwhelming numbers which have been poured in of late years, the printing of which was an enormous and useless expense. Even now selections from the petitions are published, and there is no trace of any instruction to the Committee making the selections to avoid the publication of criminatory matter; nor, as far as I am aware, was such a topic ever alluded to in the House.

It is worthy of observation that at a very early period of the usage the House attacked the great enemy of their privileges, the celebrated Prynne, in the following manner:—

'Resolved, that the summary reasons against the Bill for Reforming and Governing the Corporations, by Mr. Prynne, a Member, is an illegal, false, scandalous, and seditious pamphlet;' and upon his submission, resolved, 'that the House is satisfied;' 'and ordered, that these

votes and resolutions be forthwith *printed and published.*'*

Now here was an opportunity for putting to the test the validity of this privilege, and no one acquainted with the character and history of that remarkable zealot will believe that he refrained from any disposition to shun a conflict with the House of Commons, where he had any chance of success. Yet this was after the Restoration, when he could have had no scruple of conscience regarding the lawfulness of suing in the usurper's courts.

Let the author of the 'Remarks' turn to the 19th volume of the Journals: he will there find the votes of the House relating to the South Sea Company, and will see the Governors, Directors, and the other officers of the Company charged by name, with very grave offences, such as 'notorious breach of trust,' 'fraud,' 'corrupt, infamous, and dangerous practices,' 'infamous contrivances,' &c. &c†. We do not, however, learn that Sir Theodore Janssen, Sir Robert Chaplin, Mr. Sawbridge or any one of the crowd of libelled sufferers ever thought, I will not say of bringing an action against the publishers of this defamatory matter, (for it is not every one who is possessed of that species of courage which distinguishes Mr. Stockdale)

* Appendix to Report, p. 73. † Pages 395 to 527.

but of indicting them for that breach of the law which, if you are right, was most undoubtedly committed. Let him also turn to Mist's case, in the same volume. Mist, he will find, stigmatized in the votes as the printer of a 'false, malicious, scandalous, infamous, and traitorous libel*.'

In the 29th Volume are the votes respecting the North Briton, viz., 'that it is a false, scandalous, and seditious libel, and *that it be burnt by the hands of the common hangman.*' The votes also expressly found that it was published by Wilkes, who was moreover expelled for this offence.

It must not be forgotten that none of these cases were taken up by the House as a breach of privilege. The attacks in the two latter were not on the House of Commons but on the Government. How far it was judicious to interfere in such affairs as libels on the Government it is not material to enquire. I restrict myself to the fact which I undertook to prove, and which every volume of the Journals during the last century would abundantly attest, that the votes teem with matter, which if sent into the world without authority would subject the publishers to all the penalties of libel.

Among other bodies on which the House of

* Appendix to Report, p. 562.

Commons has thought it necessary to animadvert, is the House of Lords. In 1701, the House of Commons had, by its votes, imputed to the Lords, among other things, that their proceedings in the pretended trial of Lord Somers, were 'repugnant to justice,' and that they had made an invasion on the liberties of the subject, &c. These resolutions of the Commons were repelled by the Lords, who declared them to contain 'most unjust reflections on the Lords,' tending to the subversion of the English government. Here is a distinct charge of what would, in ordinary cases, be called a libel, yet it is remarkable that no complaint is made of the publication of these reflections, but simply of the subject matter*.

The writer's position as to the absence of defamatory matter from the votes being thus disproved, I am relieved from the necessity of entering into his objections regarding the evidence as to the publication of Reports, depending as these objections do on very minute criticism.

He has, however, in my opinion, quite failed in raising the slightest doubt of the House of Commons having now for a period of nearly two centuries acted on its right to publish such reports and proceedings as it should think fit,

* App. to Report, p. 23.

although such papers might contain matter reflecting either on individuals or public bodies. The practice being thus proved, I have now to ascertain what weight such a length of usage ought to have in establishing the privilege.

You, Sir, join with the author of the 'Remarks' in calling the time to which the usage is traced 'an ominous period from which to quote precedents in proof of the privileges of the Commons*.' 'We find it,' (says that writer) 'allowed by the Committee, that the first Parliament which ever ordered publications of this nature was the Long Parliament. This simple fact, it might have been naturally supposed, would have alone induced any one to look with suspicion upon a privilege, which, as far as the utmost research can discover, was first called into existence at such a period. But no suspicion of this kind seems to have entered into the minds of the Committee. They have collected the numerous papers which were published by the Long Parliament, and unscrupulously put them forth in this Appendix as precedents by which the present claim of the House of Commons can be supported†.'

I must own I felt some surprise at these strictures. I should have thought the names of some of the members, who sanctioned the

* Letter, p. 19. † Remarks, p. 23.

report, would have caused a little hesitation before the Committee had been accused of too much respect for the Long Parliament. Lord Stanley, Sir Robert Peel, Mr. Williams Wynne, Sir Frederick Pollock, and Sir William Follet, are not usually considered prone to *that* error. They doubtless would agree with Mr. Pitt, in his opinion of precedents drawn from that part of our history. He admitted 'that there might be as much wisdom in a resolution made in 1646 as in any other period, though,' he said, 'it was certainly a period marked with peculiar circumstances*.' When I call this an *admission*, I ought to add that it was made in the year 1790. With regard to some statesmen dates must be accurately marked on points of this nature. The course of reasoning adopted by the Committee was in perfect accordance with Mr. Pitt's views, and I can only account for your misconception, by supposing you both to have overlooked the 50th paragraph of the Report.—'The Committee cannot forbear to recur to the extraordinary periods of our history through which the precedents prevail; and to remark, that the abuse of the privilege during the Long Parliament could not fail to have arrested attention when the constitutional powers of the State were restored; and that the undeviating

* Debate on Captain Williams's petition relative to the murder of Mustapha Cawn.—Hansard's Parl. Hist. 502.

adherence to the privilege, through the reign of Charles II., proves that the restored government regarded it as inseparable from the Parliamentary trust *.'

Here the Committee expressly guard the House and the public from the possibility (as I should have thought) of imagining they meant to rest a claim of privilege on the *authority* of the Long Parliament. To my mind, their argument runs in precisely the opposite course. The continuation of the usage under the restored government, in spite of the jealousy so naturally raised against practices which had obtained in the Long Parliament, and from which the Royalists had been the sufferers, is urged by the Committee as having the force of an admission of the right by a party naturally hostile to the state of things during which it is supposed to have arisen.

To the Committee this extraordinary fact seemed a safe ground for inferring either that the power in question is inseparable in some shape or other, from the due exercise of the Parliamentary trust, or that, although the proof of the usage cannot now be carried beyond the Long Parliament, yet that at the time when it received the sanction of the restored government, it must have been known to spring from a higher and

* Report, p. 11.

purer source. I confess that my own mind is led to the same conclusion. I think it highly probable that by measures varying with the state of society, an intimate communication between the people of England and its agent, the House of Commons, had been always kept up—doubtless that communication would be more or less perfect, as the country advanced or receded in liberty and civilization.

The Report* refers to the well-known practice of publishing the Acts of Parliament by proclamation at the County Courts and other assemblies of the people; and, as in the first orders for printing, the House directed the papers to be sent to sheriffs and other local officers for publication in their respective districts, it seems probable that the printing-press was only substituted for more ancient but less convenient modes of communicating with the public.

The Committee might have supported their suggestion by a remarkable answer given by the Commons to the Lords, in the 13th Edward III., when it appears from the Rolls of Parliament that the Commons, before consenting to an aid, voted by the Lords, demand an opportunity of consulting their constituents, and promise, if such opportunity should be given, '*q'ils*

* Page 3.

mettront tut la peine q'ils purront chescun devers son pais pur aver aide bon et convenable pur nr̃e Seigneur le Roi.' Stating at the same time, that they dare not consent until they have '*conseillez et avysez les communes de leor pais**.'

The king has, in some instances, himself advised the House of Commons to consult their constituents, and it is a well known constitutional reason for a dissolution that great measures are in contemplation upon which the crown thinks fit to take the sense of the people.

From all these circumstances, it appears to me that the usage can scarcely be said to have had its origin so late as the year 1641. In my view of the case, however, it is by no means necessary to the establishment of the right that the practice should have commenced at an earlier period, or that it should have received the important sanction adverted to by the Committee, but overlooked by all who deny the right, viz., that by 42 Geo. III. c. 63, the sending and receiving of votes and proceedings in Parliament by the post is authorized, and is freed from all postage in the case of members, while the postage is reduced in the case of other persons †.

When this act passed, the House had uniformly published its votes for more than a

* 2 Rot. Parl. 104. No. VIII.

† Report, p. 5.

century. The votes had contained criminatory matter, and must continue so to do; and yet the legislature takes measures to facilitate their publication by giving the means of a cheap and swift dispersion of them by the members among the people, and also by the people at large among themselves.

I must confess, I see no answer to the argument to be derived from the legislative sanction so given. Surely it will not be said that newspapers are relieved from postage, and therefore newspapers might claim to stand on the same footing. A newspaper need not, and ought not to contain defamatory matter at all, except under circumstances where its publication is protected by the law as administered in Westminster Hall. Not so the votes; they must contain the resolutions of the House, and, as I have before said, in all cases where the House punishes an offender, his name and his offence must be stated in the resolution by which he is found guilty.

Still I revert to my former position.—That apart from the sanction of the legislature, and supposing the usage to have altogether taken its rise in 1641, the right cannot be shaken.

And this brings me to the discussion of the practical bearing, which your main proposition has on the questions before us. 'The privilege of Parliament is part of the law of the land,

and must be proved, like all other law, by written statute or immemorial usage. Statute there clearly is none—usage, as proving immemorial custom, is equally wanting*.'

That you, yourself, could hardly mean to apply this doctrine in all the rigour in which it is enounced, I should have supposed, not only from the startling effect which its application would produce in every department of our jurisprudence, but because in the preceding sentence you say, speaking of the reasons which have been urged in favour of the right, 'It is impossible to deny great weight to these arguments. Whether they are sufficient to support the proposition which they are advanced to maintain, seems to me, however, very doubtful†.'

Now, certainly, if your own proposition is to be taken without qualification, the matter is beyond all doubt, and there remains no shadow of pretence for the claim. But on the other hand, no part of your Letter enables me to form any surmise as to how you would choose to qualify the sweeping statements, both as to law and fact, which I have just cited. Neither can I invent any gloss for myself which will bring these adjoining sentences into harmony.

An experienced advocate, like you, Sir, is too

* Letter, p. 19. † Ibid.

well acquainted with the danger of broad and general assertions, not to have carefully weighed them before he trusts them to print.

'What needs the bridge span wider than the flood?'

is a question which he never forgets to ask himself in his instinctive dread, of occupying a larger basis than he is able to defend.

Taking, then, your proposition to contain your deliberate opinion, and the doubt you previously express to be nothing more than a civil acknowledgment that an opponent's arguments, are urged with as much force as the weakness of his cause will permit, I proceed to examine, First, how far the doctrine laid down holds good with regard to those portions of the law with which you and myself are most familiar; and Secondly, how far it is applicable to the claims in issue.

In argument, it is frequently necessary, in order to proceed step by step, to make statements which have the air of assuming those who are addressed to be ignorant of matters with which it is felt they must be perfectly well acquainted. For me to assume such a tone of superior knowledge with you, would be worse than absurd; and I should be sorry to do so with persons far your inferiors. I beg, then, that in what I may say, I may have credit for meaning nothing more than to imitate, as nearly as I can, the clearness and precision with which you

have dealt with your argument, and which gives me the incalculable benefit of knowing, when I cannot agree with you, exactly where our difference arises.

Immemorial usage has been defined by the judges of Westminster Hall to be a usage of an earlier date than the coronation of Richard I, on his return from the Holy Land. A layman might perhaps in his astonishment at the connexion which has been thus established between the return of a Crusader and the enjoyment of the power of memory by the law, enquire whether Richard had brought *Mnemosyne* with him from the East, or whether the joy of his return had produced an oblivion of the past from which the law never recovered.

To us, however, it is familiar that great public events were from time to time chosen as periods of limitation, beyond which titles could not be disturbed even by Writs of Right, and we also know that by a loose analogy this particular Epoch came to be adopted by the judges as a term of prescription, beyond which no enquiry as to the origin of any right dependent on usage was permitted to be made. And here, at the very threshold, it might be asked how the judges of Westminster Hall came by the right, of establishing that, or any other term of prescription? The statute which gives that date applies it only to Writs of Right, and

as that period could not, in the nature of things, be fixed upon before it occurred, the law by which it was appointed the general term of prescription, must itself have been made within the time of legal memory; consequently, there is no immemorial usage for treating the first of Richard the First as the legal commencement of immemorial usage.

This very obvious difficulty will naturally lead the enquirer to examine the title of our courts to their multifarious powers, for the purpose of ascertaining how many of them can be traced high enough to satisfy the conditions of your proposition. And with very little research he will find, that to apply the same doctrine to the Courts of Westminster Hall which you apply to the House of Commons would paralyze the whole judicature of the country!

Suppose the title of the Courts of Equity to their vast powers were subjected to your own test, could that title stand the scrutiny? If at the outset of your professional life they had been shorn of all authority but what they can show to be conferred by statutes or enjoyed by immemorial usage, should you not have had very little opportunity for acquiring the eminent position in these courts which you have so justly earned? Why, Sir, the writ of Subpœna, the foundation of the high superstructure which now exists, was only '*invented*' in the reign of

Richard the Second*. It was clearly unwarranted, and was the subject of grave complaint by the Commons, as appears by the Roll of Parliament, 3 Hen. V. 46, just cited.

The origin of the equitable jurisdiction of the Court of Chancery is thus stated by Chief Baron Gilbert, in his History and Practice of that Court:—'Towards the times of Richard the Second they [the officers of the writs] not only made use of this statute [West. 2d.] for the making of new writs [to be used in the courts of common law] but for the erecting a new jurisdiction†,' and the occasion was this:—The making the statute of *Mortmain* had curbed the growing power of the clergy. They afterwards found out an invention to avoid the statute by giving away lands to trustees for pious uses, and the feoffees of such trust did the duties of such tenure in behalf of the trust; but if they perverted the trust, the ordinary jurisdiction could take no notice of it, as being against the statute of *Mortmain* so to do [i. e. to create such trusts]; but *John Waltham*, then Bishop of Salisbury, and Chancellor, (as the Commons mentioned in their petition) [4 Rot. Par. 84.] out of his subtilty found out and began a novelty against the form of the common law, and that was the invention of the writ of subpœna. This

* 4 Rot. Parl., 84. † Page 17.

writ summoned the party to appear under a pain, to answer to such things as were objected against him: and a petition was lodged in Chancery, containing the articles to which he was obliged to answer, and upon such articles it was that this new invented writ issued. But the 7 R. 2 cap. 6. was made to hinder the growth of this court, by which damages were given to such persons that were drawn into Chancery, or before the King's Council, upon such false suggestions.'

'There are petitions of the Commons against this new invented jurisdiction. But when they had settled this new process of subpœna, in order to make the party appear, they took the whole process that had been used in parliament, in order to bring persons to answer charges exhibited before them, [the Court of Chancery] that is, the attachment, whereby they took up his body as a contempt for not appearing, the proclamation commanding him to appear upon pain of his allegiance, and likewise to attach his body wherever he was found, either within liberties or without. The next was a commission of rebellion, which recited the proclamation, and ordered the person to be taken up whereever he was found: and likewise a command to all constables and bailiffs to assist the sheriff. Those were all directed to the public ministers and officers of justice, and plainly appeared to

be the ancient prerogative process to compel an appearance in the supreme court of judicature.

If these three processes did not fetch in the party, it was presumed there was some negligence in the officers and ministers of justice, and therefore the supreme judicature [in cases before Parliament] sent an officer of their own, to see whether the party did really hide himself from justice, or not; and if the officer returned that he did, then issued out a sequestration upon all his lands, goods, and chattels whatsoever; these are the two last prerogative processes; and long it was before the Court of Chancery could fix them to subserve the justice of that court. For the courts of common law so far impugned the sequestration, the last prerogative process, that they held, if the sequestrators were resisted by the party and killed, that it was no murder, but only *se defendendo*, for that the Chancery had no jurisdiction *in rem*, but only *in personam**.'

Sequestrations are a very late encroachment; they were 'first introduced,' according to Blackstone, 'by Sir Nicholas Bacon, Lord Keeper, in the reign of Queen Elizabeth, before which the court found some difficulty in enforcing its process and decrees†.'

* Page 17.

† 3 Blk. Com., 444.

The last great struggle for jurisdiction which this court had to undergo was in the succeeding reign, when Coke, founding his opposition upon the statute 4 Hen. IV. c. 23, whereby judgments at law are declared irrevocable, unless by attaint or writ of error, denied the jurisdiction of the Court of Chancery to interfere. 'In the time of Lord Ellesmere (A. D. 1616),' says Blackstone, 'arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then Chief Justice of the Court of King's Bench, whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in Chancery, for having incurred a *præmunire*, by questioning, in a court of equity, a judgment in the Court of King's Bench, obtained by gross fraud and imposition. This matter being brought before the King, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favor of the courts of equity that his Majesty gave judgment on their behalf; but, not contented with the irrefragable reasons and precedents produced by his counsel, (for the Chief Justice was clearly in the wrong,) he chose rather to decide the question by referring it to the plenitude of his royal prerogative. Sir

Edward Coke submitted to the decision, and thereby made attonement for his error; but this struggle, together with the business of *commendams* (in which he acted a very noble part) and his controlling the commissioners of sewers, were the open and avowed causes, first of his suspension, and soon after of his removal, from his office*.'

This right, which appears so clear to Blackstone, was long after the subject of grave doubt to Chief Justice Kelynge, and to Lord Hale, and was strenuously denied by Sir Robert Atkyns†. The conquest thus obtained by prerogative, has, however, always been maintained.

It appears by their certificate that the jurisdiction was supported by the counsel to whom it was referred—Bacon, then Attorney General, and an aspirant to the seals, being one—on the ground of a practice which they did not affect to carry beyond 'six score years,' viz., the early part of the reign of Henry VII‡. Yet this practice they thought old enough to justify them in vouching the maxim *optimus legum interpres est consuetudo*, in favour of the claim§.

Coke, although he yielded to the will of the

* 3 Blk. Com., 54.

† 2 Swanston's Reports, 22, *note*. This note contains a clear and concise account of the controversy, drawn up by Mr. Hargrave. The references have been carefully revised by the learned and accurate Reporter.

‡ Collectanea Juridica, v. i., p. 39. § Ibidem.

King, appears to have lived and died in his first opinion*. He contended that the exercise of such a power was contrary to 27 Edw. III. c. 1., and 4 Hen. IV. c. 23; and cited cases in the common law courts subsequent to the reign of Henry VII., to show that the claim had been there disallowed. But I do not find throughout this long and interesting controversy, in which so many of the greatest men of our profession took part, any reference to your doctrine of immemorial usage.

It is quite clear that very shortly before the reign of Henry VII., the court was in no state to assume such a jurisdiction. Probably Henry VII. cherished and exalted the Court of Chancery on the ground which Bacon urges on James I., in the servile epistle in which he explains the question in controversy between Ellesmore and Coke, and where, addressing the King, he calls the Chancery, 'the court of your absolute power†.'

The state of it in the time of Edward IV. will be shown by a passage from Reeves's History of the Law. 'The following fact (says he) is a strong instance of the imbecility of this court. In the 22nd year of Edward IV.,‡ after a verdict, an injunction had been ob-

* 3 Inst. 25, 4 Inst. 82, *et seq.*

† Bacon's Works, by Montague, v. xii., p. 40.

‡ 22 Ed. IV., 37.

tained, which hung up the cause for some time. *Hussey*, Chief Justice, asked the counsel for the plaintiff, if they would pray judgment according to the verdict; but they declared their apprehensions about infringing the injunction. To this one of the judges said, that though the injunction was against the plaintiff, yet his attorney might pray judgment with safety; and so *vice versâ*.' *Hussey* said, that they had talked over the matter among themselves, and they saw no mischief which could ensue to the party, if he prayed judgment; for as to the penalty of the injunction, they were convinced *it was not leviable by law*, and then there remained nothing but imprisonment; and as to that, the Chief Justice said, 'If the Chancellor commits any one to the Fleet, apply to us for a *habeas corpus*, and upon the return of it we will discharge the party, and we will do every thing to assist you.' It is true, one of the justices said, he would go to the Chancellor, and ask him to dissolve the injunction: but this probably was suggested out of tenderness to the Chancellor's situation; for they agreed in declaring, that they would give judgment if the party would pray it, notwithstanding the Chancellor continued the injunction; but they said they would not give damages for the loss occasioned by the proceedings in Chancery*.'

* Reeves's Eng. Law, v. iii., p. 385.

I hope the sketch which I have thus given of the History of the Equitable Jurisdiction of the Court of Chancery (hasty and imperfect as it is,) will suffice to show that if it were limited, to the exercise of such authority only as it has received from statutes, or enjoyed from time of memory, or indeed to such as it possessed for ages after that epoch, its means of administering justice would be miserably crippled, and for almost all useful purposes utterly destroyed. I will now call your attention to a similar progress in the jurisdiction of the courts of common law.

The Courts of King's Bench and Exchequer acquired the general jurisdiction which they now enjoy over civil suits, in times comparatively recent—centuries after the return of Richard I.

'The original distribution of business among them [the Courts of King's Bench, Common Pleas, and Exchequer,] upon their first establishment, was as follows: the cognizance of crime, and of such matters of litigation in general as directly concerned the crown (those relating to the revenue excepted), was exclusively appropriated to the Court of King's Bench; civil suits between subject and subject (called *communia placita*), to the Common Pleas; and matters relating to the royal revenue, to the Exchequer. In the course of time, considerable

violations of this arrangment took place; usurpation on the province of the Court of Common Pleas being made by each of the other courts. Of these changes the general result is as follows. The King's Bench has now jurisdiction not only in those matters which belonged to it by its original constitution, but in *all personal actions* whatever. The case is the same with the Exchequer. * * * * The Common Pleas retains its original province, and therefore entertains all actions whatever between subject and subject*.'

This community of jurisdiction, together with many additions to the functions of all the courts, was obtained by an agency, which, in certain stages of society, is found potent above all others in the establishment of authority—I mean the power of FICTION. And if few, even among the priests and lawgivers of antiquity, have invoked its aid more often, and with more success, than the judges of England, it must be owned that none have used it on the whole more to the benefit of the community in which it has been employed. I will not detain you by any attempts at a history of their various legal conquests. I will, however, quote from Reeves his account of the steps by which the King's Bench arrived at their jurisdiction in civil actions.

* Stephen on Pleading, Ch. I.

'The new jurisdiction in the Court of King's Bench had [tempore Hen. VI. et Ed. IV.] assumed a novel appearance. We have seen in the reign of Edward III. that a practice had obtained of commencing actions by bill in either of the three courts in Westminster Hall; but nothing has yet been said on the nature of that proceeding; the books preserving a silence therein, till the reign of Henry VI., when there happened some cases which show that such bills in the King's Bench used to charge the defendant as *in custodia mareschalli*, intimating that circumstance to be the foundation for the proceeding. It seems that the persons in the custody of the marshal of that court might be declared against by bill for any cause of personal action, notwithstanding the prohibition of *Magna Charta*, which was construed not to extend to this privilege claimed against prisoners. The court, however, guarded this custom, which it had suffered to obtain, by a strict adherence to the notion of law on which it originated; they required that the person should be an actual prisoner of the court. Thus, in 7 Hen. VI., where a man was out on bail, it was held*, that a bill could not be filed against him as in custody†. It was moreover required that there should be some proof on record of the defendant

* 7 Hen. VI., 42. † 7 Hen. VI., 41.

being in custody, for otherwise, it was said, it lay at his option whether he would plead to the bill.

'Many devices were contrived to effectuate this requisite of custody, one of which seems to have been the exhibiting of articles of the peace; so strenuously did they endeavour to preserve the proper character of this tribunal as a criminal court. However, in 31 Hen. VI. they seemed to have relaxed a little on this point. It was then held, that if it appeared that a person was out on bail, this of itself was sufficient ground to the court to proceed against him as in custody, whether the cause of his commitment appeared or not. Thus the ground of the court's jurisdiction became a fiction, and the King's Bench began to entertain suits against persons, who were only *supposed* to be in custody, provided there were some slight grounds to warrant the supposition. It was sufficient, therefore, to file a bill with pledges to prosecute, and then by a copy of that bill, or by *latitat*, to arrest the defendant, who gave bail to appear; and then, though out of custody on bail, he still was deemed liable to plead to a declaration filed against him in any action: and this became the settled practice towards the latter end of the period of which we are now writing*.'

* Vol. iii., p. 386.

The Court of Exchequer adopted the fiction that every plaintiff, who chose to sue there, was the King's debtor; and this fiction being established for truth, it followed as a matter of course, that the Barons, whose duty it was to enable the Crown to recover its debts, should interfere in favour of a party who, to say nothing of the merit of buying his law at their mart, was 'the less able to pay the King,' in respect of his unsatisfied claim against the defendant. How far any creditor, except the King, would think his chance of payment increased when he found his debtor bringing actions for assault, or for slander, or in any way plunging into law-suits as a mode of raising a fund for the creditor's benefit, may admit of doubt.

It may be supposed that the Court of Common Pleas would hardly remain perfectly tranquil while these encroachments were going on; but their attention was occupied in similar incursions into the province of the County Courts. Disputes, nevertheless, did arise; but it would be a waste of time to trace their history. Roger North, the Boswell of legal biographers, tells an amusing story of the war as it was carried on in the reign of Charles II.

'It seems that in old time the business of the Court [of Common Pleas] was very great, because the officers are numerous.' * * * 'The

chief justice hath the disposing of the officers of the court, but at the admission the other judges not caring to see the pudding creep and have no share expect to be attended; the consequence whereof is a small present.' * * *

'Notwithstanding this long catalogue of officers, his lordship [Chief Justice North] found the Court ill supplied with business to keep them all employed; for, as matters had been ordered in Westminster Hall, the Court of King's Bench went away with much the greatest share of the suits promoted by London writs; and the proper court sat idle, and had scarce enough to countenance their coming to Westminster Hall every day in the term: and it was thought that if the country attorneys, who were most of the Common Pleas, had not, by taking apprentices, continued a succession of such as brought their business to that court, it had been utterly deserted. This may seem wonderful, but really so it was: for, the two courts being upon terms of competition, the King's Bench outwitted the Common Pleas: and it was by gaining an easy way of holding to special bail upon latitats; for plaintiffs are commonly very outrageous, and love to turn the first process (by a barbarous abuse of special bail) into an execution, which ought to come after execution [judgment] and be the last. And the Common Pleas was rightly served;

for they thought to exclude the King's Bench by getting an act of Parliament that none should be held to bail unless the cause of action was expressed in the writ. That was done of course in the original writs returnable in the Common Pleas; but not in the King's Bench, where the process of latitats was, viz., *in transgressione super casum*. There the Common Pleas thought they had nicked them. But the King's Bench was not so sterile of invention as to want the means of being even with that device; and therefore they added in their writs *ac etiam billæ* to the *transgressione super casum* (for instance) *centum librarum;* and then, said they, the cause of action is mentioned in our writs. This was advantage enough over the Common Pleas; for their originals were fineable, and not so expedite to be put in due form as the common *transgressione super casum;* for, upon that, the party, being (as the style of the court is) *in custodiâ marescballi,* may declare for any cause of action whatever. The late Chief Justice Sir Orlando Bridgman, and his officers of the Common Pleas, gave this way of proceeding by the King's Bench very ill language, calling it an arbitrary alteration of the form of the legal process, and utterly against law. But the losers might speak; they got nothing else; and the *triccum in lege* carried it for the King's Bench; which court, as I said, ran away with all the business.

'In this melancholy state his lordship found his Court of Common Pleas, when first he sat there; and his mind was much taken up with speculations concerning it, and deliberating whether or no a way might be found out to set themselves upon a level (at least) with the King's Bench as to common pleas. He thought it hard that the court, instituted for such, should be deprived by a court that was instituted for pleas of the crown; and that it was a shame to be outwitted. He did not see but they had as much power over the process of the law as the King's Bench had; and, at last, determined to put in execution the same device that they had used, which, being good law at one end of the hall, would not be against law at the other [*or perhaps a few feet beyond the other.*] And it was by doing the same thing in their writs called *clausum fregits*, upon which a *capias* lies; and, after appearance, the plaintiff may declare for debt, or assumpsit, &c., and filing a proper original at any time, before a writ of error brought, warrants the judgment. This was by adding the same words *ac etiam billæ*, &c., and then they, upon the *clausum fregits* (without fine or delay), might hold to bail, as the other court did upon the latitats. But this was not done without very much consideration, and, weighing all consequences, and all objections, and compromising all interests, that the regulation might

pass smooth, and without opposition from any but the King's Bench, for whom they had an answer ready. For whereas the Lord Chief Justice Hales exaggerated the same objections against the Common Pleas, as Bridgman had before urged against the King's Bench; [Hale speaks of 'that unwarrantable writ called *clausum fregit*' as an "unhandsome shift*"] it was asked how he could criminate the Common Pleas for that which his court had done, and continued to do every day†.'

The Chief Justice, we are informed, in this very curious piece of history, 'weighed all consequences, and obviated all objections,' and acted on 'much consideration.' But how did he obviate the objection on which you insist against the House of Commons? How did he obtain power without the aid of a statute, when he was acting not upon, but *against* immemorial usage? He obtained this power just as the Court of King's Bench obtained power over the statute referred to by Roger North, when, as Hale says, they 'contrived the special latitat to preserve their just jurisdiction, which had been lost by the late Act concerning bail, without that expedient'‡. In truth, both Courts treated the

* Hargrave's Law Tracts, 288.

† Roger North's Life of Lord Keeper Guildford, Vol. I., p. 200 et seq.

‡ Hargrave's Law Tracts, 289.

doctrine in question with very little ceremony. 'That which was good law at one end of Westminster Hall, would not, the Chief Justice thought, be against law at the other;' and this was enough for that part of the subject. What demanded the caution which North evinced in this, as in every other step of his life, was quite another affair, as his brother proceeds to show.

'The great difficulties to be got over were, first, to reconcile the King's interest, and, next, the Lord Chancellor's. The King had fines upon the originals, and the Lord Chancellor disposed of the Cursitors' places that made them out. But his Lordship surmounted them, by showing that care should be taken (and orders, for that end, were effectually established) that originals should be filed where they were necessary, and they were not otherwise filed before; and the *ac etiams* should not take place, but in such cases only where a latitat would serve. So the officers, or the crown, did not lose any thing; but, on the contrary, were like to be great gainers by bringing a flow of business into the court, which would have that effect. For what was got by forcing all suitors to proceed by latitat, which could produce no original, and so decline this way that sometimes would produce them? And to show the necessity of it, it was made appear that, for the ease

of arrests and bail, even the attornies of the Common Pleas used the King's Bench writs, by dealing in the names of the proper attornies of that court. I remember that, when this matter began to be formed in his Lordship's mind, he thought of using the words *nec non* instead of *ac etiam;* and then the writs, for distinction-sake, should be called *nec nons;* but at length, he thought fit not to vary a syllable; for however the thing was the same, the different sound would serve to quarrel at; and, in captious matters, it is best to give no handles. * *

After this process came into common use, it is scarce to be conceived how the court revived and flourished; being, instead of vacation in term, rather term in vacation*.'

Such then were the steps by which the judicature of the country arrived at its present state, and it cannot be denied, that however tortuous and irregular has been the path, and however questionable the motives of some who have pursued it, the public has been on the whole a gainer by the competition for business which has been created in the three courts of law, operating as it has done to give a more easy access to the suitors; and, by rendering the judgments of each court the subject of indirect revision by the others, to induce care and consideration in

* North's Life of Guildford, vol. i., p. 206.

the opinions pronounced. That this has been the view of the subject adopted by the legislature, cannot be doubted, since all the late changes have had for their object to destroy the remaining barriers which prevent every suitor from going into each court at his choice. And perhaps it might be well if the principle were reduced to practice in its fullest extent, so as to include pleas of the crown, the poor law, cases of revenue, Quare impedit, &c.

It seems to me impossible to advert to the origin of the jurisdiction of the court of King's Bench over suits like that of Stockdale v. Hansard, which has given rise to the present controversy, without being struck with the fact, that if the court shall be held to possess the right of questioning in the cause now before it, the privileges of the House of Commons, it will owe such jurisdiction to a usage commencing within legal memory; an origin liable, therefore, to precisely the same exception which you make to the privilege under review! Moreover, it appears that this jurisdiction was acquired purely by assumption. By the exercise of the power *jus dare*, when the court only possessed the right *jus dicere*. In short, by a clear abuse of that function, which you deny to the House of Commons, lest it *should* be abused, videlicet, the power of declaring the law of the court.

But the proceedings of the courts in creating law, have by no means been confined to extending their jurisdiction. Jurisdiction, it is true, has been considered a province in which the creative powers of the courts were to be exercised with peculiar vigour; and, accordingly, the practice has, from a remote age, been sanctified by the maxim, '*Boni judicis est ampliare jurisdictionem;*' still this exercise has always been without prejudice to more extensive claims.

Practising in the courts of equity, which administer so large a portion of the law relating to real property, you are in a situation to appreciate, more accurately than I can do, the magnitude of the change to which I am about to refer. I may, therefore, appeal to you to say, whether any ten Acts of Parliament, including the Bill of Rights, and the Reform Act, have produced such important effects on the community at large as those decisions of the courts on common recoveries, by which the statute *de donis* was practically repealed, and land, instead of being inalienable, was brought into the market to be dealt with on the principles applied to the other commodities of life?

Blackstone's account of the change is so short and pithy, that I must be indulged with transcribing it:—

'As the nobility were always fond of this

statute [*de donis*] because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and, therefore, by the contrivance of an active and politic prince, a method was devised to evade it. About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV.; which were then openly declared by the judges to be a sufficient bar of an estate tail. For though the courts had, so long before as the reign of Edward III., very frequently hinted their opinion that a bar might be effected upon these principles, yet it was never carried into execution; till Edward IV. observing (in the disputes between the houses of York and Lancaster), how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court: wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail, should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present I shall only say,

that they are fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal; and that these recoveries, however clandestinely introduced, are now become by long use and acquiescence, a most common assurance of lands; and are looked upon as the legal mode of conveyance by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even Acts of Parliament have, by a side wind, countenanced and established them*.'

In much later times, however, the manufacture of what Bentham called judge-made law, has continued to be a staple trade of Westminster Hall.

Roger North informs us, he had heard Chief Justice Pemberton say, 'that in making law he had outdone King, Lords, and Commons†. The same remark has been applied to Lord Mansfield, whose labours in framing the commercial code of the country, are thus eulogized by an able writer in a work of deserved celebrity:—

'This his favourite object of enlarging, as it

* 2 Blk. Com., 116.

† Life of Guildford, vol. ii., p. 37.

were, the boundaries of justice, he had opportunities of achieving by other means besides his spirited interpretation and equitable administration of the laws already established. As no body of laws, however excellent, and however copious, can possibly foresee or provide for the countless variety of circumstances that are made the occasion of litigation, every judge must of necessity be more or less frequently obliged to take upon himself, in some degree, the office of a legislator; and this duty Lord Mansfield was called upon to perform far oftener than any magistrate who has ever presided in our courts. The length of time during which he sat on the bench, would of itself be sufficient to account for such a peculiarity as this in his career. But there were also other causes that increased it beyond all proportion to the mere difference in point of duration of judicial authority between himself and other judges. During the latter half of the eighteenth century, the rapid growth and extension of our foreign commerce, gave birth to a host of novel sources of litigation, connected, for the most part, with matters which had not only been entirely overlooked by the legislature, but had been very little brought before the notice of the courts, or when they had been referred to them, had been decided with reference, not so much to any settled principles, as merely to the facts of

each particular case. Lord Mansfield treated them in a very different mode.

'Within these thirty years,' said Judge Buller, on giving judgment in the case of Lickbarrow v. Mason (2 T. R., 63), 'the commercial law of this country has taken a very different turn from what it did before. We find in Ince and Prescott (1 Atkyns), that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period, we find that, in courts of law, all the evidence in mercantile cases, was thrown together; they were left generally to a jury, and they produced no general principle. From that time, we all know, the great study has been to find some certain general principle which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the understanding. And I should be very sorry to find myself under a necessity of differing upon any case upon this subject, which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country*.'

* Life of Lord Mansfield, Law Mag., vol. v., p. 83.

The establishment of great principles is indeed 'the office of the legislator.' I wish he would better and more promptly execute it; but until this is done either the law must lag far behind the age, or our judges must continue to legislate, not from accident, or from the impossibility of at all times keeping within the boundary which theory would prescribe to the interpreter of the law, as distinguished from the law maker, but deliberately, and to prevent the grievous irritation produced by the action upon one state of society, of laws made for another. Perhaps, however, it is too much to expect that formal legislation should ever keep pace with the wants of mankind. The change in the habits, manners, and transactions of men are pressed on the notice of the judge by his daily duties. The legislator may be long in ignorance of the discrepancy between the law, and the actual state of things. Hence the doctrine laid down by Lord Mansfield at the bar, and which he often enforced on the bench. 'All occasions,' he argues, 'do not arise at once. A statute can very seldom take in all cases; therefore the common law that works itself pure by rules drawn from the fountain of justice is, for this reason, superior to an act of parliament*. A further extract from the article already quoted will put the subject in a clear light.

* Omychund *v.* Barker. 1 Atkyns, 33.

'The fact that there were no precedents or authorities to control the exercise of his judgment, in this department of law, as it must add considerably to our admiration of the wisdom that dictated his decisions upon it, so it has also materially contributed to enhance their utility, and to widen the application of them. Not being here, as elsewhere, under the necessity of reasoning on principles that, though they still hold good their footing in Westminster Hall, are virtually obsolete elsewhere, and are totally at variance with the actual customs and exigencies of society; having no occasion, for instance, as in some real property cases, to frame a judgment at the close of the eighteenth century, on the same grounds that Glanvil might have done in the reign of Henry II., he was enabled to indulge without restraint his favorite wish of accommodating the administration of justice to the spirit and the wants of his own time. Among other obvious advantages which this has imparted to his decisions in mercantile cases, it is by no means a trifling one, that they are of equal authority in courts of law and in courts of equity. 'During the fifteen years I have sat on this bench,' said, on one occasion, the distinguished judge whose testimony we have just quoted, (Tooke *v.* Hollingworth, 5. T. R., 215,) 'I have never known any case which established a distinction between courts

of equity and courts of law, on subjects of this kind; I have always thought it highly injurious to the public, that different rules should prevail in different courts on the same mercantile case. My opinion has been uniform upon that subject. It sometimes, indeed, happens that in questions of real property, courts of law find themselves fettered with rules from which they cannot depart, because they are fixed and established rules, though equity may interpose, not to contradict, but to correct, the strict and rigid rules of law.

'But in mercantile cases, no distinction ought to prevail. Nor is it in English courts alone, whether of law or equity, that this uniformity subsists with respect to Lord Mansfield's decisions on matters of commercial jurisprudence. As they were invariably framed in conformity with those broad principles of justice and policy which, having received the unanimous assent and sanction of all civilized communities, form the ground-work of what (for want of a more correct term) is called the law of nations, it may safely be affirmed that there are very few tribunals in Europe where they might not be quoted as authorities*.'

To this just tribute let me add the concise and forcible eulogium of Burke:—'His ideas

* Omychund *v.* Barker. 1 Atkyns, 84.

go to the growing amelioration of the law, by making its liberality keep pace with the demands of justice, and the actual concerns of the world; not restricting the infinitely diversified occasions of men, and the rules of natural justice, within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and our empire*.'

Whoever justly values the labours of Mansfield, will perhaps regret rather that our courts should still be so 'frequently fettered,' than that they should have had courage on some occasions to break their chains. Bentham, indeed, was of opinion that their fetters were like those of the actor on the stage, merely for show; not really putting any limitation on the power of the judges, but, on the contrary, only furnishing them with an excuse for setting up the rules of law against the claims of justice: but, with profound respect for the memory of that great jurist, I do not adopt his opinion. That instances may be produced in which he has furnished the right solution of the motives of particular judges cannot be doubted. With all history to range through, it would be miraculous if the conduct of that or any other body of men would not furnish matter for severe animadversion; but standing upon the rule, and

* Report from the Committee on the Trial of W. Hastings.—*Burke's Works*, 1834, vol. ii., p. 620.

disregarding exceptions, I cannot doubt that the vacillation which suggested that opinion to Bentham, was caused by the difficulty of steering between the extremes of open legislature on the one hand, and the too strict an observance of obsolete or barbarous rules on the other, which produce every hour a failure of justice.

I feel that the usurpations of the courts of common law in affairs of jurisdiction cannot be thus explained; they have not, I am well aware, the excuse of necessity, nor of any public object; for the benefits which have incidentally flowed from these encroachments could hardly have been foreseen, and, indeed, are never alluded to. To them we must apply the maxim so frequently necessary to the peace of society, *Quod fieri non debet factum valet.* I am far from calling this maxim in aid of the privilege which I am defending, although if its assistance were necessary, I do not see with what grace it could be refused.

In the minds of those who have been satisfied with gathering their notions of the judicial office from any theoretical distinctions between judges and legislators, the distance from which the former have wandered from their own province must have created some surprise. Not only the instances, but the classes of instances might, however, have been easily multiplied. Their power of repealing acts of Parliament has been seen in

the fate of the statute '*de donis*.' In that case the common law judges were the repealers; the equity judges, however, were not slow to follow their example on a fitting occasion. After a time the statute of Uses was passed, the effect of which was to bring the administration of real property back to the courts of common law; and there it might have remained, 'but one or two technical scruples which the judges found it hard to get over (says Blackstone), restored it to the Court of Chancery with tenfold increase.*' And this court having lost the power which it gained in former times by the doctrine of Uses, now regained it 'under the denomination of Trusts,' and thus, continues Blackstone, 'a statute made upon great deliberation, and introduced in the most solemn manner, had little effect than to make a slight alteration in the former words of a conveyance†.'

Great judges, Lord Coke, Chief Justices Hobart and Holt among the number, have held that acts of Parliament may be void as being 'against common right and reason;' which repugnancy must, of necessity, be determined by the judges, who would thus sit as a Court of Appeal from King, Lords, and Commons. This doctrine, bold as it is, appears to have had the concurrence of Serjeant Hill, whom Lord Eldon

* 2 Blk. Com. 335. † Ibid.

once said *he knew* to be the best lawyer in the profession*.

Some acts there are which do not seem to have obtained the slightest notice in any part of Westminster Hall, but to have been treated with contempt (sometimes most richly deserved) by all the courts. I will instance that notable Act of 33 Hen. VI., which limits the number of attorneys in each of the counties of Norfolk and Suffolk to six, and in the city of Norwich to two, on account, among other reasons, of the 'ignorance' of the practitioners. This ignorance the Legislature had previously attempted to provide against in a more legitimate manner. 'By 4 Hen. IV.,' says Barrington, 'it is directed that the judges shall examine the attorney before he is admitted. This statute still remains in force, though it is not the modern practice to comply with it†.' Barrington's reproach has been lately removed as we all know, by a delegation of the duty to the Incorporated Law Society.

Fees of court and suitors' costs the judges appear to have considered in a peculiar manner within their own power. Thus although several old statutes had peremptorily fixed the fees at certain specified amounts, they were raised from time to time, as the value of money diminished;

* Dr. Bonham's case, 8 Co. Rep. 118, a., and Frazer's note thereon.

† Barrington on the Statutes, p. 373.

generally (as far as can be ascertained), by the officers themselves; but their attempts to do themselves justice must have had the sanction of the judges, whenever the question was raised between an ignorant suitor, who thought that because a statute was unrepealed it must be in force, and the more enlightened officer, who held what was found, on trial, to be 'the better opinion.'

The accretions of centuries round the fees allowed by these old statutes, had so completely hidden the original nucleus, that it was difficult to trace any connexion between the petty sums mentioned in the Acts and the decent remunerations into which they had grown. And when a late Commission was appointed to compensate officers who were about to be deprived of their fees by changes in the law, it was found necessary to give the Commissioners authority to hold any fee legal for the purpose of compensation, if they judged it reasonable in itself, and if it had been uniformly taken for fifty years*. It was felt that to resort, as the measure of compensation, to statutes which had been disregarded for centuries, and of which many of the officers had never heard, would be gross injustice; and thus an expedient was adopted of making fees legal for one purpose, which if it should ever be held that

* 1 & 2 Will. IV., c. 35.

judges have *not* the power of repealing these Acts of Parliament, might be found to be illegal for all others.

Another instance of practical repeal is this. The 1 James I., c. 10, recites, that "all exactions, extortions, and corruptions are odious, and prohibited in all well-governed commonwealths;" and enacts, "That no person to whom any order or cause shall be committed or referred by any of the King's judges, or courts at Westminster or any other court, shall directly or indirectly, or by any art, shift, colour, or decree, have, take, or receive any money, fee, reward, covenant, obligation, promise, agreement, or any other thing, for his report or certificate, by writing or otherwise, upon pain of the forfeiture of 100*l.* for every such report or certificate, and to be deprived of his office and place in the same court. Provided, nevertheless, that it shall be lawful for the clerk to take for his pains for writing of every such report or certificate 12*d.* for the first side, and 2*d.* for every side after, and no more, upon pain to forfeit 10*s.* for every penny taken over and above the said sum."

This Act, so clear and explicit in its terms that no doubt could have arisen upon its meaning, has always been treated, as far back as information can be obtained, as if it never had passed. The Legislature, when depriving the officer of his gratuity from the parties to the

suit, forgot to remunerate him from any other source. Accordingly, with the aid of the courts, who probably thought such an arrangement 'contrary to natural justice,' he continued a practice which the Act characterizes in no equivocal terms.

With regard to costs the judges have repealed, I might almost say the multiplication table: for double costs, as given by any Act, they have construed to mean costs and half costs. Treble costs, by the same rule, mean costs and three-quarters*. A principle of construction by which, as the mathematician will see, Parliament, although it may approach to what are double costs in the vulgar acceptation of the term within any assignable limits, can never quite reach them, and still less go beyond them by force of any multiplier which it may choose to insert in future Acts.

But even confining them strictly within the limits of their authority upon the narrowest construction of it, the control of the judges over the law must necessarily be enormous. Those who are called upon to administer the law must declare what the law is before they can apply it. Over that portion of the *lex terræ* of which they are the constitutional interpreters, it is for them to declare, by virtue of their office,

* 2 Tidd's Practice 987.

what is law and what is not. Of the law of Scotland, of the Roman law, in short, of all foreign law, an English judge may be ignorant without shame. His office does not imply any knowledge except of the statute and common law of England. If, incidentally, the knowledge of any other law be required, he may obtain it from witnesses. He may learn it as he learns any other fact in the case before him, or he may know it as being a person of education, or because it is a matter of notoriety, and therefore known to all the world. That law, however, of which he is one of the *sages*, he knows in a different capacity: while declaring or interpreting *that* he is *lex loquens*. In the study of that law, he is presumed to have employed the *viginti lucubrationes annorum* which have qualified him for the bench; and there he speaks as an oracle. But as I shall hereafter attempt to prove he is not presumed by the constitution to have any more skill in the law of privilege than in the law of France. He only knows of its existence as other men are presumed to know the common and statute law: as a rule of conduct by which they are to walk, and not as a science in which they *have skill*.

I will now briefly show how extensive is the power flowing from this high trust, with which the judges are clothed, of declaring and interpreting the law of their own courts.

With regard to modern acts of parliament the power of declaration is practically extinct; but with regard to ancient statutes the case is different, whether certain ancient documents operate as statutes—whether they were ever perfected or not, as the London Tithe Act*, are points of law which the judge has to determine. From time to time statutes are found in old manuscripts†, and whether they are to be received as genuine, or rejected as spurious, is also a question for the judges.

Still as respects the statutes, their legitimate powers of declaring the law are reduced within narrow bounds; but what shall be said of the common law, which to all practical intent, has been created by their decisions, and is every day, perhaps ever must be, subject to modifications at their hands.

A very remarkable exercise of the right to declare the common law took place in the year 1800, to which I will call your attention—it may also incidentally support my position that the judges are not expected to be conversant with any branches of knowledge except the common and the statute law.

In that year a tradesman was convicted on two indictments of the offence of engrossing hops. On his behalf it was urged that the sta-

* Macdougal v. Purner 2 Dow. and Clark, 135.

† Hallam's Constitutional History, vol. i., p. 4.

tutes against engrossing, &c. had been repealed by 12 Geo. III. c. 71., and that this latter act having been brought into parliament pursuant to the report of a Committee of the House of Commons, containing a resolution that the laws against badgers, engrossers, forestallers, and regraters, by preventing a free trade in provisions had been the means of raising prices, it was clear that Parliament had intended not merely to repeal the statutes against such practices (which his counsel submitted were declaratory of the common law) but that it was intended that such transactions should no longer be controlled. And in support of their argument they quoted the preamble of the repealing act, in which it is recited, 'that it hath been found by experience that the restraints laid by several statutes upon the dealing in corn, &c., have a tendency to discourage the growth and enhance the price of the same.' Lord Kenyon and the rest of the court disagreeing, however, with the legislature on the policy of these regulations of trade, held that the common law remained untouched, and accordingly fined the defendant a thousand pounds, and imprisoned him for many months: still further enhancing the severity of his punishment by a severe lecture on his 'heinous offence against religion and morality, and the established law of the country,' 'as transmitted

by the most reverend sages of the law,' together with the usual *cantilena* of our 'ancient system of jurisprudence, the growth of the wisdom of man for so many ages*,' &c. &c.

It is not a little curious that Lord Kenyon, while upholding our ancient system, answers an objection of the defendant's counsel, that hops were not a 'victual, because they had, at one time been held to be a poison,' by observing that 'times went on and things changed, and what was formerly considered as poisonous is now become a necessary of life.' Times have continued to go on, until all men, judges included, have found out that modes of dealing which were formerly held to be the poisons of trade are not merely harmless, but positively beneficial; and the common law, notwithstanding its accumulated wisdom, has been forced to recant its errors and change with the altered opinions of mankind: so difficult is it to find any part of our jurisprudence which remains as it was at the return of Richard from the Holy Land.

Thus, although the judges could resist the legislature, they have yielded to the force of public opinion. And so much for the exercise of the jurisdiction to declare the law, which when claimed by the House of Commons with

* Rex *v.* Waddington, 1 East., 143 *et seq.*

reference to their own portion of the *lex terræ* is held up as a new and unheard-of monster.

But before I proceed to draw the inferences which appear to me necessarily to arise from the foregoing statement of facts, I must trespass further on your patience to inquire whether the power of *interpretation*, which is the characteristic duty of the judicial office, and on which I have not yet touched, does not draw after it a prodigious power—a power which like that of *declaring* law, leads daily to consequences which cannot in their effects be distinguished from legislation.

A familiar instance at once occurs to my mind. Soon after the introduction of navigable canals into this country, difficulties arose in rating their tolls to the poor, under 43rd of Elizabeth. These difficulties were, however, soon resolved into this one question, whether there should be a proportional rating of the profits of the canal, in each parish through which it passed, or whether they should be rated in those of the parishes only where the tolls became due. In favor of the proportional rating it was urged that the land now occupied by the canal in each parish having borne its share of the parochial burdens before it was applied to its present purpose,—it was unjust that it should be withdrawn (as it were) from its own, and made to yield a revenue to other parishes. The

Court of King's Bench, however, decided against the proportional rate for many reasons. Among others for this, which was given by Lord Kenyon, a judge of great legal acquirements, but, as we have already seen, not very conversant with some other branches of knowledge. 'Arguments,' he says, 'of justice and policy have been now urged; and it has been said that the tolls should be considered to be due in each parish in respect of the quantity of land occupied by the navigation. But hard would be the lot of the officers who are to make the rates in these several parishes; they would have to measure not only the length but the breadth of the navigation in each respective parish, and to ascertain with precision the exact quantity of land covered with water: these difficulties would be insuperable, and it would be in vain to think of rating at all, if such were the rule*.'

This case was decided in the year 1792, and the law as there laid down was long acted upon. In the year 1819, however, it was by the same court overruled, and the doctrine of proportional rating established†.

In theory this proceeding is doubtless not the exercise of legislative authority, but, I

* Rex *v.* Page, 4 T. R., 547.

† Rex *v.* Melton, 3 B. and A., 112, confirmed by Rex *v.* Palmer, 1 B. and C., 546, and many subsequent cases.

think, you will agree with me that, in practice it would be difficult to establish any very useful distinction between such a course of interpreting law, and the power of making it.

Yet, not unfrequently, time is considered to have the power of confirming an erroneous interpretation, and thus the same construction which commences by being an error, ends, without any change in itself, in becoming a binding exposition. In the case of the Bishop of London *v.* Ffytche, Lord Mansfield says, 'we are bound by the decisions if we thought them ever so wrong. The general question is so well established, that I do not think it would be decent to go into it.' In the same case, Mr. Justice Buller says, 'Nothing but positive authority could make me concur in opinion with the rest of the court;' but, he admits, 'The decisions are uniform, and unless we support them the rule of *stare decisis* must be blotted out of the books*.'

Again, the rude construction of Acts of Parliament drove or encouraged the judges to vary the meaning of the words of a statute according to circumstances. Sometimes words are to be held not imperative, but directory,—not operating as a command which must be obeyed, but as advice which, though it ought to have weight,

* 3 Douglas, 146.

may be rejected. Sometimes where a statute would appear to a common eye to be confined to a small number of persons, it is held that the smaller number is only mentioned by way of example, and that the act extends to a large class. Thus, the statute '*Circumspecte Agatis*,' (how this *writ* became a *statute* nobody knows) applies in terms only to the Bishop of Norwich, but it has been extended to include all bishops*. Probably, therefore, the *Glossa Veperina* put on the Act, limiting the numbers of the Norwich attorneys, by which it was held in practice to apply to no attorneys at all, proceeded on the doctrine of set off, which is very properly favoured in our courts, although it has not avowedly been extended to the interpretation of Acts of Parliament.

Sometimes, however, 'Expressio unius est *exclusio* alterius.' Thus coal mines having been mentioned in the enumeration of valuable property in the 43rd of Elizabeth, all other mines have been held to be thereby excluded†.

Then again the enumeration of a part shall neither be held to include or exclude the remainder, but shall have a middle operation. Thus, if a statute begin with speaking of colleges, deans and chapters, parsons, vicars and others having spiritual promotions, bishops are

* 2nd Inst., 487. † Rex *v.* Cunningham, 5 East, 478.

not included, it being a rule that if the enumeration commences with *inferior* persons general words do not extend it to superior persons*.

Then there is the doctrine of the 'Equity of a Statute,' by which a meaning has frequently been given to Acts of Parliament, altogether independent of the terms used by the legislature.

I have now given a few examples of the methods by which the courts fix the legal meaning of statutes. I have done enough to show that they possess a great controul over their operation, even without departing, at least in appearance, from the strictest limits within which it can be seriously proposed to confine their functions; and I have now ended the long detail into which I have been led, and I shall at once proceed to draw the inferences, which it appears to me necessarily follow from these facts.

I. I set out with citing your main proposition, which, for clearness, I now repeat.

'The privilege of Parliament is part of the law of the land, and must be proved, LIKE ALL OTHER LAW, by written statute, or immemorial usage. Statute there is clearly none; usage, as proving immemorial custom, is equally wanting.'

* Abp. of Canterbury's Case, 2 Rep. 46.

I respectfully submit that the facts which have been adduced, disprove your *major*. I submit that the proposition, that all law is composed either of statutes or immemorial custom, however familiar to our ears in legal reasoning, cannot be maintained in a practical and enlarged sense—in the sense, in short, in which you have used it. In legal arguments we often use maxims, couched in terms much too general to be true, because they are notoriously confined in their effect by implied restrictions. Now, I submit, that the operation of your broad proposition is limited in various ways by lawyers, and among others, by the doctrine of presumptions.

You will remember, that in the famous resolution of the judges in the case of Corporations, they held that an ancient usage *in derogation of a right of popular election granted by charter*, although such usage 'began within time of memory,' was good, and that 'some ordinance or constitution shall be presumed, though none can be shown*.'

So usage will support a presumption of a charter from the crown, which ought to be matter of record, though such charter, if it ever existed, must have been granted within time of memory†. Even Acts of Parliament have been

* 4 Co. Rep. 77. † Mayor of Hull *v.* Horner, Cowper 102.

presumed, when no trace of one could be found; and although, if they ever had passed at all, it must have been long within time of memory*.

Indeed, it frequently happens that presumptions are held good, not because they are true, but in spite of their being known to be false. 'There are,' says Lord Chief Justice Hobart, 'presumptions of law so violent, *as though they be false*, a man shall not be received to aver against them†.' Sir Charles Wetherall, I remember, did not think 'violent' an epithet sufficiently strong for one of this class—he called it a '*tempestuous* presumption.' The principle of these presumptions was clearly avowed by Lord Mansfield. 'A grant,' says he, 'may be presumed from great length of possession. It was so done in the case of the Corporation of Hull *v.* Horner. Not that in such cases the court really thinks the grant has been made, because it is not probable a grant should have existed without its being upon record, but they presume the fact for the purpose, and from a principle of quieting the possession‡.' So until a recent Act, a jury was directed to presume *on their oaths* a covenant to support a title to window lights where they had been enjoyed more than twenty years before, although both

* Lopez *v.* Andrew, 3 Manning and Ryland, 329 (note).

† Hob. 297.

‡ Eldridge *v.* Knott, Cowper, 214.

the judge and the jury well knew, that to make such a covenant, would be what nobody under the circumstances would ever dream of; so anxious are the judges to support usage, though for very small portions of time compared with any now under consideration.

If then I should concede that your doctrine is admissible into this controversy, I should, I think, have a fair right to demand that it might be accompanied by the controlling rules and maxims by which its operation in the courts of law is kept within due bounds. The evidence carrying the enjoyment of the privilege so far back as to the year 1641, the House would have an undoubted right to a presumption in favour of its existence from time of memory; and even if the usage could be shown to have arisen at that period, a presumption must be made in favour of a lawful commencement.

But I think myself justified in repudiating the doctrine altogether, not merely on the ground that it has ever been set at naught by the judges themselves, when it interfered either with an increase of their own powers, or with what they deemed the interests of justice; but because it is one of a set of rules, framed by the Courts of Westminster Hall, to regulate their own practice, and which, as it appears to me, they would no more be justified in attempting to force on the House of Commons, than that

House or Court would be justified in demanding that Westminster Hall should follow the course of procedure which it had thought fit to lay down for itself. Nay, not so much, for as the grand inquest of the nation, to watch over all jurisdictions, and as a court of clear and admitted superiority to the Courts of Westminster Hall, there would be much less repugnance to constitutional analogy in such a course, than in the opposite, which is now contended for. I for one regret to see any attempt at such a supervision on either side.

Nor must it be forgotten, that the Parliament is as much the Parliament of Scotland as of England. There probably the terms of prescription are taken from the civil law, and differ materially both in date and effect from ours. Doubtless, legal memory has no connexion with our Richard I., who was a foreign prince to the Scots. Why then should the course of procedure of Westminster Hall bear sway, and that of the Parliament House of Edinburgh yield? or is it to be said that a privilege may be bad in England and good in Scotland, and *vice versâ?*

It appears, that as early as the reign of Richard II., a course of proceeding, differing from either the common or the civil law, had obtained in Parliament: the particular time and occasion certainly do not seem to me to

entitle the precedent to much weight, as establishing a principle, although it is relied on as authority by Coke*, by Selden, in his Notes to Fortescue†, and by the House of Commons in the dispute with the Lords, respecting the case of Ashby *v.* White‡. And, as appears in the masterly report of the committee of the Commons, respecting Hastings's trial, drawn up by Mr. Burke, it has been strenuously supported in many subsequent cases§. I refer of course to the petition preferred by Parliament, and allowed by the King, on the great occasion of the trial of Chief Justice Tresilian and others, in the eleventh year of this reign.

The King, as a last effort to save his guilty servants and abettors from the sanguinary vengeance of the Lords appellants, had suggested that the accused ought to be tried according to the course of either the common or the civil law, and directed the sages of both the common and civil law to give good counsel to the Lords. They attended, and pronounced the appeal or impeachment bad, according to the course of either law. It was, however, declared, with the assent of the King, that the cause should not be tried *par autre ley q̃ ley et cours du Parlement*‖.

* 4 Inst. 15.

† Seld. Opera, vol. vi., p. 1900.

‡ Howell, St. Tr., v. 14.

§ Burke's Works, vol. ii., p. 599.

‖ 3 Rot. Par., 236—244.

My object in this citation is to show, that even in these early times there was a known law and course of Parliament, differing from both the common and the civil law: the application of this fact to the case then under consideration, is quite immaterial to my present purpose. Neither is it material that in certain parts of these proceedings the Lords have chosen to adopt on particular occasions the rules of practice of Westminster Hall.

II. 'But whatever (you say) the law, upon this difficult question, may at present be found to be, there appears no countenance whatever in the authorities for the dangerous assertion, that the order of the House of Commons justifies the act of publishing, without reference to the nature of the publication. If such an order can justify the publication of libels (or, if that term be objected to, the circulation of false statements injurious to individuals), it can, by parity of reasoning, justify the violation of copyright—it may, in fact, justify any act or any wrong whatever*.' * * * *

'According to this resolution (you say in another place), the House can establish its own privileges by its own declaration;—it can make

* Letter, p. 34.

privilege whatever it declares to be such; its privileges are not subject to question in any court of justice, directly or incidentally; and, by its own authority, it can punish at discretion all who venture to dispute its claims. It is obvious, therefore, that, under the name of privilege, it may engross every authority of the state both legislative and judicial*.'

These passages imply that the power claimed by the House is one which ought not to exist, on the ground that it is either a usurpation of legislative authority in principle, or that it inevitably becomes such in practice; you therefore assume, that the assertion of a right to declare what are existing privileges is not to be distinguished from the claim to make new ones. That there is a clear distinction in theory you will, of course, not deny; but the danger of abuse appears to you so imminent, that you seem to think the use may be altogether forgotten. Another assumption is, that if this power can be taken from Parliament it will exist nowhere else.

But I submit to your consideration that, however liable it may be to abuse, as all power is, it is, nevertheless, one which, in the nature of things, must be confided to some hands. For all practical purposes, the law itself does not

* Letter, p. 35.

exist, and more especially the *lex non scripta*, unless an authority is established somewhere to declare it. The question then is, not whether there shall be such a power, but to whom it shall be entrusted, or rather, to whom it *has been* entrusted, since this is not an inquiry as to what ought to be, but as to what already *is*.

That such an authority is liable to be made the instrument of usurpation is admitted. The detail through which you have passed proves it most abundantly, for the increase of authority obtained by the judges, however beneficially exercised, is not the less a usurpation. The history of Parliament, fertile enough, as all history is, in the abuse of power, will furnish no instances of encroachment at all to be compared, either in number or importance, with those of Westminster Hall, and yet you are so far from thinking the community insecure with regard to that most important portion of the law over which the judges have always enjoyed the power of declaration, that you labour hard to shew that privilege, the remaining portion, should also be put under their controul; for, in claiming for Westminster Hall a right to question the validity of a privilege declared by the House, you, by necessary implication, assert their right to that power which you deny to the House of Commons. It is, then, quite clear that you are not prepared to abide by the consequences to

which your own objections lead. You would not visit the judges with the censure implied in your mode of stating the right claimed by the House of Commons: still less would you sweep away that valuable portion of law and equity which has been produced, however irregularly, by the power of declaration in the judges, and by that power alone. Nor can you propose to deprive them of the right to declare the law, since you have reflected much too closely, I am persuaded, on the subject of jurisprudence, not to see that, however it may be abused, the authority to declare that law, the knowledge of which has raised him to the bench, cannot, even in theory, be separated from the office of the judge; and, consequently, although you object that the jurisdiction claimed by the House of Commons might gradually absorb every other power in the State, you are so little alarmed by the same power in the judges, that you seek to add to it. Surely this is inconsistent. If the liability to abuse is a reason against the trust, there would be little propriety in removing it into hands, where, if we may judge of the future by the past, the danger would be increased a hundred-fold. Probably there might be no danger of the privileges being extended by the judges, but they might be diminished—an evil which, all will admit, might produce incalculable mischief; at all

events, the Houses would lose their power of self-existence and preservation, which, in the course of these remarks, I hope to show it is of vital importance to keep intact.

But supposing that looking to the future it it might be well to make the transfer. I must again take leave to remind you that this inquiry regards the past. We are each endeavouring to ascertain what the law is, and not what it ought to be.

If such a devolution of power should ever be proposed in the Legislature, then it will be right to balance the advantages on the one side and the other; but for the present purpose, such examination, unless restrained within the narrowest limits, is only calculated to mislead. To a certain extent it is doubless, relevant to the advocate in a legal argument, to show, in addition to stronger grounds, that the law, as contended for, would be more just and more expedient than as maintained by his opponent; but as there is no human law that might not be improved, so there is none which will stand the unrestrained use of such a test. In a future letter I shall, however, incidentally offer some reasons to show that such a change would be anything but an improvement; and I shall conclude, for the present, by calling your attention to the consequences necessarily arising

from the supposed authority in the Courts below to question the declared privileges of the House.

A concurrent jurisdiction in the judges is claimed for them as incident to their jurisdiction over the cause in which the question of privilege or no privilege may arise. But on that ground—and it is the only ground which can be suggested—the same must be conceded to every court in the country. Suppose Mr. Stockdale had refused to pay for a copy of the Report which he may have bought at Hansard's shop, and had been sued for the price in the Court of Requests, he may have repeated the defence made for him with success in the Court of Common Pleas against the action brought by the printer of 'Harriette Wilson's Memoirs,' to recover the amount of his bill for printing that notorious work. There it was held that the book was immoral and libellous, and not the subject of a contract*.

If your view of the law be correct, why may not the Court of Requests entertain a like defence and give a like judgment? Whether or not such a decision would be good law I do not say, but if you are right, it would at all events be pronounced by a court of competent jurisdiction, and as no writ of error lies, it would finally

* Poplett *v.* Stockdale, Ryan and Moody, 337.

and for ever conclude the parties from questioning its validity in any other place.

Or suppose Mr. Stockdale had assaulted Mr. Hansard, and complaint had been made to a justice of the peace, with a view to a summary conviction under the Act. It is quite clear that it would be the duty of the magistrate to enter into the provocation before he affixed the fine; and if the report, reflecting on the accused, was unlawfully published, that circumstance might be held very much to mitigate the offence. Thus the privileges of either House might be drawn into discussion at Queen's-square or Bow-street, and the merits of this controversy might come to be determined by a justice of the peace!

But take the case now before the Court of Queen's Bench. On a writ of error, the rights of the House of Commons must await the allowance of the House of Lords. The author of the 'Remarks' perceives no objection to this arrangement; for 'What danger could by possibility arise to the Lower House of Parliament, by having any of its privileges investigated by the Lords, who have an equal interest in protecting that privilege, if by law it exists, for themselves as well as for the House of Commons? And after all, even on the supposition of an erroneous judgment by the Lords, that judgment might in these cases, as in others, be reversed by the whole Parliament, in the exer-

cise of its judicature by statute*.' Here, however, he goes a little too far, for a learned writer in the 'Law Magazine,' who nevertheless, is equally adverse to the claims of the House of Commons, and who thus expresses himself:—'There is no disposition to blink the real difficulty of the constitutional question. If the privileges of the House of Commons are examinable in the courts of law, they may be brought by writ of error before the House of Lords, who may not always be considered desirable judges of the privileges of the Commons. If the privileges of the Lords are, in like manner, examinable before the courts of law, they may be brought back to themselves, to be the ultimate judges of their own privileges. The last supposition is certainly repugnant to the spirit of our laws and constitution, and were it to occur, recourse would doubtless be had to the supreme jurisdiction and real last resort of the whole Parliament. Yet after all, extravagant as seems the pretension to be the *ultimate* judges of their own privileges, it is no more than the Commons claim; they also claim to be the *sole* judges† !'

Few, I think, there are who will not agree with the latter writer, that the House of Lords 'may not always be considered desirable judges of the privileges of the Commons.' If surprise

* Remarks, 127. † Law Magazine, vol. xviii., p. 269.

should be felt that a man of talent and constitutional reading should express himself with such an appearance of hesitation on a point so clear, it must be remembered that it is the admission by an adversary of a defect fatal to his cause. If the Commons hold the privileges of their House at the will of the Lords, that power of self existence which I cannot but feel it is the great object of privilege to sustain, is already gone. Imagine for a moment such a doctrine established when the House of Commons won from the Crown and the Peers its right to originate money Bills, and to hold the strings of the national purse until the specific appropriation of every shilling of revenue has been agreed upon—a struggle which continued through ages. Is it possible such a power could ever have been attained and perfected if the Commons had held all their other privileges at the mercy of the Lords?

The author of the 'Remarks' thinks this identity of interest will prevent the Lords from interfering with the privileges of the Commons; but in the first place, their privileges, as I have just shown, are not identical, and many other instances might be mentioned. That appellate jurisdiction, by which they would exercise the control in question, and which, as I shall hereafter show, the Lords *established within the time of memory by virtue of their*

own declaration, is itself a distinctive privilege. The power of fine and of imprisonment for a definite period, are also privileges enjoyed by the Lords, and either never possessed or abandoned by the Commons. The Lords can administer an oath—the Commons cannot—what is to prevent the Lords making this the ground of a thousand differences in privilege between the two houses. I must confess, I am quite at a loss to understand the jealousy which denies the right of the Commons to declare their own privileges, and immediately invests it in the Lords, who would thus become the ultimate judges of all privilege, as they undoubtedly are, of law and equity.

Surely the danger of one body 'engrossing every authority in the state' can hardly be allayed by such a proceeding as this.

The writer in the 'Law Magazine' says, 'there is no disposition to blink the real difficulty of the constitutional question.' But his manner of meeting it seems to me very like blinking it. He says, 'if it occurred that the Lords should sit as a court of appeal on their own privileges, the question would perhaps be determined by Act of Parliament.' But to say nothing of the proposed remedy, leaving untouched the interference of the Lords with the Commons, which is admitted to be undesirable, the whole argument against the right of the House of Commons

assumes that the power will be corruptly used. Hence the perpetual references to the Long Parliament, and the '*civium ardor prava jubentium.*' Hence we are reminded of the apophthegm of Burke, that 'all men possessed of an uncontrolled discretionary power, leading to aggrandisement and profit of their own body, have always abused it*.'

Now to meet the hypothesis of corruption in the Commons, I may be permitted, without indecorum, to put the case of self-aggrandisement in the Lords; and then let me ask what would be the chance of prevailing on the Lords to reverse as legislators, the decision which they had, in their own favour, pronounced as judges!

I will not pursue this invidious topic any further, but here bring my first letter to a close, and subscribe myself,

My dear Sir,

Very truly yours,

M. D. Hill.

Thomas Pemberton, Esq, M.P.

* 'Thoughts on the Causes of the Present Discontents.'—Cited in the Law Mag.

LONDON:
Printed by William Clowes and Sons,
Stamford Street.